IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT J. D. STRONG, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-PJC**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANT PETERSON FARMS, INC.'S
MOTION IN LIMINE REGARDING FORMER EMPLOYEES

Defendant Peterson Farms, Inc. ("Peterson") hereby submits its Motion in Limine Regarding Former Employees, requesting the Court to exclude the evidence, testimony, references, attorney statements, arguments as further discussed herein. In summary, Peterson seeks to exclude and/or limit the following types and categories of materials:

1. Peterson seeks to limit the weight given to the statements and/or testimony of its former employees whose deposition designations are expected to be offered into evidence by Plaintiffs at trial;

2. Peterson seeks to exclude the use of depositions, statements and documents of its former employees from prior, unrelated lawsuit; and

3. Peterson seeks to exclude any expert and personal opinions offered by its former employees.

In support of its Motion in Limine Regarding Former Employees, Peterson states and shows as follows:

I. The Weight Given to Statements and Testimony of Former Employees Should Be Limited at Trial

Peterson seeks to limit the use and weight given to the statements, deposition testimony or live testimony of its former employees, whose statements and testimony may be offered at trial. On point, Plaintiffs have designated portions of deposition testimony of Kerry Kinyon, who was a former executive of Peterson; Dan Henderson, who was also a former executive of Peterson; and Ron Mullikin,[1] who held various nonexecutive positions with Peterson, including a brief period as a liaison on certain limited environmental matters related to the Eucha-Spavinaw Watershed. With regard to Mr. Mullikin, Plaintiffs have also exhibited a pattern of offering a number of memoranda and writings from Mr. Mullikin prepared during his employment with Peterson.

Peterson expects, based on questions asked at the depositions, prior use of the testimony and Mr. Mullikin's memoranda, that Plaintiffs will offer the statements and testimony of one or more of these former employees as purported admissions of a party opponent or for related, and equally impermissible, purposes in contravention of Federal Rule of Evidence 801. Furthermore, Mr. Mullikin's memoranda, which address issues related solely to the Eucha-Spavinaw Watershed and the City of Tulsa's allegations related thereto, are also inadmissible under Federal Rules of Evidence 401 and 403.

[1] Mr. Mullikin is the subject of further discussion, *see* arguments, *infra*, Parts II and III, regarding use of his testimony from a prior, unrelated lawsuit and certain opinions which he is not qualified to give based on education, knowledge or experience.

A. *Background Information*

For purposes of background, Mr. Kinyon was deposed in the matter on June 4, 2008; his employment with Peterson, however, ended in approximately November 2006. Mr. Henderson was deposed in this case on June 5, 2008. His employment with Peterson also ended years before Plaintiffs deposed him in this matter. Mr. Mullikin was deposed in the *City of Tulsa v. Tyson Foods, Inc*., et al., lawsuit on July 18, 2002, and in this case on November 14, 2007. Mr. Mullikin was not employed by Peterson at the time of either of these depositions. Mr. Mullikin also authored several memoranda during his relatively short tenure with Peterson regarding the political environment surrounding the City of Tulsa's allegations against the poultry industry related to the Eucha-Spavinaw Watershed, which preceded its 2001 lawsuit.

None of these deponents were designated by Peterson as a corporate representative under Federal Rule of Civil Procedure 30(b)(6) during any of the aforementioned depositions and, especially with regard to Mr. Mullikin, were not otherwise authorized to speak for or on behalf of Peterson. Instead, Plaintiffs deposed two of Peterson's designated Rule 30(b)(6) representatives, Ray Wear and Kirk Houtchens; were given the opportunity for a second deposition of one of those representatives, Mr. Houtchens; and had the opportunity to depose a third corporate representative, all of whom had the authority to speak on behalf of and bind Peterson. As such, the statements and deposition of the former employees should not and cannot be used at trial for the purposes for which Plaintiffs have sought to use them in other settings.

B. *Use of the depositions should be limited or excluded*

The use of the depositions of former employees and limitations thereon is set out in Federal Rule of Civil Procedure 32 and Federal Rule of Evidence. Foremost, Plaintiffs' bear the burden of establishing the admissibility of the deposition testimony they have designated. *See*

Garcia-Martinez v. City of Denver, 392 F.3d 1187, 1191 (10th Cir. 2004). Plaintiffs' burden of establishing the admissibility of deposition testimony comprises a two step analysis. *See* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2142, at 159. "First, the condition set forth in Rule 32(a) must exist before the deposition can be used at all. Second, when it is found that these conditions authorize the use of the deposition, it must be determined whether the matters contained in it are admissible under the rules of evidence." *Id.*

Specifically, with regard to the first portion of the analysis, as pertaining to the instant motion, Federal Rule of Civil Procedure 32(a)(3) provides that "[a]n adverse party may use for any purpose the deposition of a party or anyone who, *when deposed*, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Fed. R. Civ. P. 32(a)(3) (emphasis added).[2] As previously noted, none of the subject deponents were employed by Peterson at the time they were deposed and Mr. Mullikin was never designated a spokesperson for Peterson on the subject matter of interest to Plaintiffs, making the deposition testimony of these three former employees inadmissible of under the initial portion of this analysis.

Even were Plaintiffs able to satisfy their initial burden, they cannot satisfy the second prong of the analysis. The admission by party-opponent provision in Federal Rule of Evidence 801(a)(2)(D) is narrowly defined and does not include the statements of Peterson's former employees. Like Federal Rule of Civil Procedure 32(a)(3), the party-opponent provision has a temporal element that is not met by the subject deposition transcripts. In this regard, the admissions by party-opponents are limited to a statement offered against a party, which is "a statement made by the party's agent or servant concerning a matter within the scope of the

[2] To the extent that Plaintiffs contend the deposition testimony satisfies one or more of the other categories in Rule 32(a), they nonetheless have the burden of demonstrating admissibility of the deposition testimony.

agency or employment, *made during the existence of the relationship*." Fed. R. Evid. 801(d)(2)(D) (emphasis added). Again, Plaintiffs cannot dispute that any statements made by Mr. Kinyon, Mr. Henderson or Mr. Mullikin during their respective depositions occurred outside the existence of their employment relationship with Peterson, rendering any purported admission made during the deposition inadmissible hearsay.

C. *Mr. Mullikin's memoranda should be excluded*

The limitation in Rule 801(d)(2)(D) also precludes the admission of Mr. Mullikin's memoranda for any use. Instead, Mr. Mullikin has made clear that the statements in the memoranda were his *personal* opinions and not those of Peterson. Ex. 1, Mullikin Depo. (2007) at 99. He further confirmed at his 2007 deposition that he was not speaking for Peterson during his depositions, *see* Ex. 1, Mullikin Depo. (2007) at 100; was not intending to bind Peterson by any of his testimony, *id*.; was not an officer or executive of Peterson during his employment, *id*.; and was not authorized to make statements binding on Peterson during his employment. *Id*. Thus, the hearsay statements in the memoranda are not admissible evidence in this lawsuit.

Moreover, Mr. Mullikin's memoranda are inadmissible in this action because they are not relevant to the subject matter of Plaintiffs' lawsuit, *see* Opinion and Order, Dkt. #932 at 3-4 (finding that the putative relevance of materials from the *City of Tulsa* lawsuit "is not readily apparent on its face"), and also fall within the scope of materials properly excluded under Federal Rule of Evidence 403, which provides, in pertinent part, as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Fed. R. Evid. 403.

As noted, the Court has previously determined that discovery materials from the *City of Tulsa* lawsuit, such as Mr. Mullikin's memoranda, are of limited probative value. *See* Dkt. #932

at 3-4. During his 2007 deposition, Mr. Mullikin confirmed the Court's finding in response to Plaintiffs' questions to him regarding his memoranda: "As I said, I don't have any recollection of what was going on in the Illinois River watershed at that time. I was primarily involved on the Eucha-Spavinaw." Ex. 1, Mullikin Depo. (2007) at 41; *see id.* at 102 (disclaiming any knowledge related to the IRW).

Likewise, demonstrating that the memoranda are unfairly prejudicial and would confuse the issues to be considered by a fact finder in this case, Mr. Mullikin further testified that the statements in his memoranda were driven by the political climate during the period when he was wrote the memoranda. *See id.* at 57. This point borne out in the language of one of the memoranda, to wit:

> *I personally have no opinion on whether or not the integrator or the grower owns the litter. I do feel, without any doubt, that as time passes, we the integrator will be found liable for it and the affect it has on our environment.* This position will be driven by both environmental groups and the EPA.
>
> . . . Unfortunately, too many of these regulations are being driven by political ambition. We have VP Gore, leading the fight to clean the nations [sic] waterways, and at the same time lead the fight to become our next president. Knowing full well, no one will be able to fight his environmental record. We have the mayor of Tulsa, who would like to be the Gov. of OK. Politics will continue to drive this issue.
>
> We are also faced with a lack of science to help us understand where we are, and where we need to go. . . .

Ex. 2, Mullikin Memo. (3/27/1998) (emphasis added); *see* Ex. 1, Mullikin Depo. (2007) at 105 (testifying "risk of liability was driven by politics rather than science").

Plaintiffs have repeatedly cited the highlighted portion of Mr. Mullikin's *personal* opinion for the incredible proposition that Peterson has made some universal admission of liability, when Mr. Mullikin is simply prognosticating that, at some point in the future, someone will file a politically motivated action against participants in the poultry industry. As previously noted, Mr. Mullikin was not authorized to make statements during his period of employment that

would be legally binding on Peterson, Ex. 1, Mullikin Depo. (2007) at 100; and Plaintiffs have not offered any evidence that Peterson or its management adopted or expressed agreement with Mr. Mullikin's prognostications, further rendering Mr. Mullikin's inchoate opinions unfairly prejudicial to Peterson.

As such, for the foregoing reasons, Plaintiffs should be prohibited from offering into evidence in this matter statements or deposition testimony of Peterson's former employees Kerry Kinyon, Dan Henderson and Ron Mullikin. As demonstrated, the statements of these employees are inadmissible hearsay which do not fall within an exception to the hearsay rule and, with regard to Mr. Mullikin's memoranda, lack any probative value and are unfairly prejudicial to Peterson.

II. Use of Ron Mullikin's Deposition and Memoranda from Prior, Unrelated Lawsuit Should Be Excluded from Evidence at Trial

In addition to the foregoing, Peterson seeks to exclude any use of the deposition transcript of Ron Mullikin taken during the *City of Tulsa v. Tyson Foods, Inc*., et al., lawsuit, which this Court has previously determined in not related to the instant matters. *See* Dkt. #381. Nonetheless, Plaintiffs have designated portions of Mr. Mullikin's 2002 deposition for use in trial of their claims in this lawsuit. Peterson maintains that use of the 2002 deposition is improper under Federal Rule of Civil Procedure 32 and that the designations are inadmissible hearsay that do not fall within the scope of Federal Rule of Evidence 804(b)(1). Alternatively, use of the 2002 deposition amounts to needless presentation of cumulative evidence, warranting an exercise of the Court's discretion to exclude its use from trial. *See also* Dkt. #932 at 4 (finding that materials from the City of Tulsa lawsuit are "not necessarily relevant to the current proceeding").

As an initial matter, Federal Rule of Civil Procedure 32(a)(8) limits the use of a deposition taken in an earlier case, to wit: "A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action *involving* [1] *the same subject matter* [2] *between the same parties, or their representatives or successors in interest*, to the same extent as if taken in the later action." Fed. R. Civ. P. 32(a)(8) (emphasis added). Under this standard, Plaintiffs' use of Mr. Mullikin's 2002 deposition is prohibited by Rule 32(a)(8). Foremost, the *City of Tulsa* case addressed alleged taste and odor issues associated with a portion of the City of Tulsa's drinking water supply. This case, on the other hand, addresses the recreational use of waters in the IRW. In addition, the parties to the two separate matters are different: The State of Oklahoma was not a party to the *City of Tulsa* action, and there are Defendants named in this lawsuit who were not involved in the *City of Tulsa* action. Thus, Mr. Mullikin's deposition does not comport with the language of Rule 32(a)(8). *See also* Dkt. #932.

Federal Rule of Evidence 804 provides exceptions to the hearsay rules where the witness is "unavailable" as the term is defined in the rule. As applicable to the instant matter, Rule 804(b)(1) allows the limited admission of former testimony of an unavailable witness under certain circumstances, to wit:

> Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil trial action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed. R. Evid. 804(b)(1). Mr. Mullikin's 2002 deposition does not pass muster under this exception to the hearsay rule.

In this regard, the Court has previously made a related ruling on discovery materials from the *City of Tulsa* lawsuit, which suggests that the "opportunity and similar motive" requirement of Rule 804(b)(1) is not satisfied, to wit:

> Although Plaintiffs do identify some surface similarities between the *City of Tulsa* action and the currently pending case, such similarities are not enough to require a *carte blanche* production of all documents from the *City of Tulsa* action. The two lawsuits involve separate watersheds, different water bodies, and different poultry farms located on separate watersheds. Plaintiffs [then and now] provide no explanation for seeking the depositions and documents in an action which dealt with a different watershed and different water bodies. The Court has considered the arguments of the parties as submitted in the briefs, and the Court has listened to hours of oral argument on different issues detailing the differences in the two watersheds. The Court concludes that the relevancy of the requested documents is not readily apparent on its face.

Dkt. #932 at 3. The Court went on to conclude that experts in the two cases were different, and the "claims by Plaintiffs in this lawsuit are broader than in the *City of Tulsa* lawsuit." *Id*. at 4.

Similarly, Mr. Mullikin testified in his 2007 deposition that his knowledge and experience is limited to the Eucha-Spavinaw Watershed at issue in the *City of Tulsa* lawsuit. *See* Ex. 1, Mullikin Depo. (2007) at 102. Thus, Peterson cannot reasonably be said to have had the "opportunity and similar motive to develop the testimony" of Mr. Mullikin during his 2002 deposition. *See also Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160-61 (4th Cir. 1986) (discussing "opportunity and similar motive" requirement). Moreover, Mr. Mullikin voluntarily appeared in the Tulsa offices of Riggs, Abney, Neal, Turpen, Orbison & Lewis—one of Plaintiffs' contingent contract counsel—for his 2007 deposition, suggesting either that he is not "unavailable" or that Plaintiffs have not satisfied their burden of demonstrating his unavailability. *See* Ex. 1, Mullikin Depo. (2007), cover page.

Furthermore, as evidenced by their *Motion for Partial Summary Judgment* (Dkt. #2062), Plaintiffs have no intention to be bound by Federal Rule of Evidence 804(b)(1) when it comes to

Mr. Mullikin's deposition testimony. Indeed, Plaintiffs cite Mr. Mullikin in support of general propositions against *all* "Defendants" or "poultry integrators" regarding issues of purported control; awareness of politically motivated litigation, such as Plaintiffs; and agronomic issues related to the land application of poultry litter. *See* Dkt. #2062 at 15-16, 17-18, 23, 28, 34. Moreover, Plaintiffs' designations from Mr. Mullikin's *City of Tulsa* deposition cover the same or similar subject matter. *See* Ex. 3, Mullikin Depo. (2002) at 49-50, 167-68.

Even were the deposition designations from Mr. Mullikin's 2002 deposition admissible under the exceptions to the hearsay rule, they should nonetheless be excluded from trial under Federal Rule of Evidence 403 as lacking probative value and as "needless presentation of cumulative evidence." Fed. R. Evid. 403; *see United States v. Roark*, 753 F.2d 991, 994 (5th Cir. 1985) (Rule 403's major function is "'excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.'") (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979)).

In the portions of the deposition designated by Plaintiffs, Mr. Mullikin is asked to opine on various matters dealing with his liaison duties on behalf of Peterson related to the Eucha-Spavinaw Watershed. For instance, Mr. Mullikin was asked to give his opinion on the need for the land application of litter where there was not an agronomic need for phosphates and a proposed solution to this purported problem (*cf.* Fed. R. Evid. 602, 702). Ex. 3, Mullikin Depo. at 49-50.[3] He was also asked to testify regarding his knowledge regarding the historic use of poultry litter, replying that he could not do so without resorting to speculation (*cf.* Fed. R. Evid. 602). *Id*. at 167. He was also asked for his opinion on the purported knowledge of the

[3] The questions asked of Mr. Mullikin call for expert opinions on matters on which is he unqualified to testify on the basis of knowledge, skill, experience, training or education. *See* Fed. R. Evid. 702. These opinions are the subject of a separate motion. *See* Motion in Limine to Exclude "Expert Opinions" of Ron Mullikin, *infra*, Part III.

"integrator industry" related to issues attributed to poultry litter (*cf.* Fed. R. Evid. 602). *Id.* at 167-68.

These aforementioned topics, which are inadmissible for various other reasons,[4] are nevertheless covered not only in Mr. Mullikin's 2007 deposition, *see, e.g.*, Ex. 1, Mullikin Depo. (2007) at 13 (purported knowledge issues), 23 (historic use of litter), 34 (knowledge issues), 35-36 (agronomic issues), but also in the testimony covered by a number of Plaintiffs' other proposed and/or designated witnesses at trial: Christopher Teaf (historic use of litter; *see* Dkt. #2384-3, Teaf Decl. (June 2009), ¶ 8, as supplemented by Dkt. #2384-2); Gordon Johnson (agronomic issues; *see* Ex. 4, Gordon Johnson Depo (8/18/2008) at 96-98); Dan Parrish (agronomic use of litter; see Ex. 5, Parrish Depo. (6/9/2006) at 26-29); Kirk Houtchens (historic management, use and application of litter; *see* Ex. 6, Houtchens Depo. at 76-78, 94-103). Furthermore, these other witnesses are "available" to testify at trial (or, in the case of Mr. Houtchens, designated to speak on behalf of Peterson), providing all the more reason to exclude use of Mr. Mullikin's 2002 deposition, to wit:

> Underlying both the constitutional principles and the rules of evidence is a preference for live testimony. Live testimony gives the jury (or other trier of fact) the opportunity to observe the demeanor of the witness while testifying. William Blackstone long ago recognized this virtue of the right to confrontation, stressing that through live testimony, "and this [procedure] only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." Transcripts of a witness's prior testimony, even when subject to prior cross-examination, do not offer any such advantage, because "all persons must appear alike, when their [testimony] is reduced to writing."

United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007) (citations omitted). Notwithstanding that the *Yida* case addressed matters in the context of the Sixth Amendment, the principles recited by the court have equally compelling applicability here.

[4] Peterson has made separate objections to Plaintiffs' designations from Mr. Mullikin's 2002 deposition, which are reasserted here and incorporated by reference.

Accordingly, Plaintiffs should be prohibited from using the deposition transcript from the *City of Tulsa* lawsuit of Ron Mullikin at trial, whether the testimony therein is determined to be hearsay outside of a recognized exception of the needless presentation of cumulative evidence that Plaintiffs can otherwise offer through the live testimony of other witnesses.

III. The Expert and Personal Opinions of Ron Mullikin Should Be Excluded from Evidence at Trial

Peterson seeks to exclude any and all opinions and testimony, whether contained in the 2002 or 2007 deposition transcripts or Mr. Mullikin's memoranda, containing expert opinions that he is not qualified to give under Federal Rule of Evidence 702, which provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Likewise, Peterson seeks to exclude use of Mr. Mullikin's personal opinions, because they are not helpful to a clear understanding or determination of any fact in issue, *see* Fed. R. Evid. 701, and they are not based on his personal knowledge. *See* Fed. R. Evid. 602. Moreover, Mr. Mullikin's opinions do not express the opinions of Peterson, rendering them inadmissible under Rule 403. *See* Ex. 1, Mullikin Depo. (2007) at 100

During his deposition in this lawsuit and during his prior deposition in the *City of Tulsa* case, Mr. Mullikin was asked to opine on a number of scientific and technical matters for which he is woefully unqualified to offer an opinion admissible under Rule 702. However, as otherwise required by Federal Rule of Civil Procedure 26, Mr. Mullikin has never been disclosed by any party as an expert witness. *See* Fed. R. Civ. P. 26(a)(2); *Aumand v. Dartmouth Hitchcock Med. Ctr.*, 611 F. Supp. 2d 78, 88 (D.N.H. 2009) (listing authorities requiring disclosure of

nonretained experts). Moreover, in neither his 2002 nor 2007 deposition was there any attempt to qualify him as an expert on any topic pertinent to the instant lawsuit. Even had such an attempt been made, Mr. Mullikin is not competent to give expert opinions on the matters on which he has been asked to opine.

As an initial matter, Mr. Mullikin is a high school graduate who has "[n]ot quite a semester" of college study. Ex. 3, Mullikin Depo. (2002) at 5-6. In addition, Mr. Mullikin does not possess any specialized training in the environmental sciences, Ex. 1, Mullikin Depo. (2007) at 112; does not have any specialized training in soil science, *id*.; does not have any education or training in agronomy, microbiology or chemistry, *id*.; and does not have any expertise in alleged human health effects of poultry litter. *Id*. at 112-13. Indeed, during his 2007 deposition in this matter, Mr. Mullikin conceded that he was not qualified to offer any scientific or engineering opinions. *Id*. at 113. Any purported familiarity he may have with issue related to poultry litter are strictly limited to the Eucha-Spavinaw Watershed at issue in the *City of Tulsa* lawsuit. Ex. 1, Mullikin Depo. (2007) at 102. Furthermore, Mr. Mullikin's views on this other watershed are nothing more than his personal opinions. Ex. 1, Mullikin Depo. (2007) at 99.

Moreover, Mr. Mullikin's professional experience, especially in recent years, is heavily weighted towards marketing and management in the retail sector in which he was employed both before and after his position with Peterson. *Id*. at 113-14, 120.[5] He was hired by Peterson for a

[5] After leaving college, Mr. Mullikin worked for a few years for his father who operated a chemical fertilizer plant and retail sales operation in Iowa and worked for another chemical fertilizer related employer. Ex. 3, Mullikin Depo. (2002) at 6-8. These limited employment experiences do not by themselves, contrary to Plaintiffs' likely contentions otherwise, qualify Mr. Mullikin to offer expert opinions in this lawsuit on the management and use of poultry litter an organic fertilizer and soil amendment in the IRW. Indeed, although Defendants do not concede the point with regard to the experts criticized by them, Plaintiffs have elsewhere argued that a putative lack of *specific* experience of otherwise impeccably credentialed experts rendered their opinions inadmissible under Rule 702. *See, e.g.*, Dkt. # 2058 (arguing that a professional engineer with 20 years of experience in agricultural and environmental engineering is not

position in human resources based on his experience supervising and training employees. *Id*. at 116. During his employment with Peterson, Mr. Mullikin did not have any responsibility for the various environmental responsibilities associated with Peterson's processing plant. *Id*. at 118. His brief employment with Peterson was his only experience in the poultry industry. *Id*. at 119. Finally, since leaving Peterson's employment, Mr. Mullikin has not held any positions with any type of environmental responsibility. *Id*. at 121.

As is evident from the foregoing, Mr. Mullikin is not qualified to offer any expert opinion in the case on issues pertaining the use or management of poultry litter as a fertilizer, soil amendment or otherwise. Nonetheless, as discussed in Part II, *supra*, Mr. Mullikin has been asked in both of his depositions for opinions on matters of agronomy and agricultural and industry practices, which are clearly beyond his competence. *See* Fed. R. Evid. 601, 602. Similarly, in his 2007 deposition, he was asked to give expert testimony regarding certain hearsay statements contained in the *Poultry Water Quality Handbook*, *see* Ex. 1, Mullikin Depo. (2007) at 71-72, 75-78, which Mr. Mullikin concedes he has never completely read. *See id*. at 121. Other expert testimony on similar topics is spread throughout Plaintiffs' deposition designations. In all cases, Mr. Mullikin has not been disclosed by Plaintiffs as an expert witness and his opinions on these various environmental, agricultural or industry topics do not satisfy the requirements for admissibility under Federal Rule of Evidence 702. As such, Plaintiffs should be prohibited from offering any of testimony of Mr. Mullikin from either his 2002 or 2007 depositions or any statements from his memoranda, which amounts to an expert opinion on any topic.

---

qualified to opine on environmental sampling related to alleged nonpoint sources). While not well taken with regard to Defendants' experts, Plaintiffs' criticisms undoubtedly apply to Mr. Mullikin, who does not have any specific or meaningful experience with the use or management of poultry litter.

Furthermore, as noted above, the opinions that Mr. Mullikin has expressed in both his depositions and memoranda are his personal opinions. Ex. 1, Mullikin Depo. (2007) at 99-100. These personal lay opinions too are inadmissible in this action because they do not satisfy the requirements of Federal Rule of Evidence 701. Foremost, the subject matter of the personal opinions is the Eucha-Spavinaw Watershed, *see id.*, which is neither at issue in this case nor relevant to it. *See* Opinion and Order, Dkt. #932 at 3-4. As such, Mr. Mullikin's personal opinions are not helpful to a clear understanding or determination of any fact in issue in this case. Consequently, Mr. Mullikin's opinions and statements should also be excluded as inadmissible lay witness opinion testimony.

IV. Conclusion

For the reasons stated herein, Defendant Peterson Farms, Inc. requests the Court for an Order excluding and/or limiting use of the foregoing categories of evidentiary materials, including any and all testimony, references, attorney statements or arguments.

Respectfully submitted,

By /s/ Philip D. Hixon
A. Scott McDaniel (Okla. Bar No. 16460) smcdaniel@mhla-law.com
Nicole M. Longwell (Okla. Bar No. 18771) nlongwell@mhla-law.com
Philip D. Hixon (Okla. Bar No. 19121) phixon@mhla-law.com
Craig A. Mirkes (Okla. Bar No. 20783) cmirkes@mhla-law.com
McDANIEL, HIXON, LONGWELL & ACORD, PLLC
320 South Boston Ave., Suite 700
Tulsa, Oklahoma 74103
(918) 382-9200
and
Sherry P. Bartley (Ark. Bar No. 79009)
Appearing Pro Hac Vice
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.
425 W. Capitol Ave., Suite 1800
Little Rock, Arkansas 72201
(501) 688-8800

COUNSEL FOR DEFENDANT
PETERSON FARMS, INC.

CERTIFICATE OF SERVICE

I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General Kelly Hunter Burch, Assistant Attorney General	drew_edmondson@oag.state.ok.us kelly_burch@oag.state.ok.us
Melvin David Riggs Richard T. Garren Sharon K. Weaver David P. Page Riggs Abney Neal Turpen Orbison & Lewis	driggs@riggsabney.com rgarren@riggsabney.com sweaver@riggsabney.com dpage@riggsabney.com
Robert Allen Nance Dorothy Sharon Gentry Riggs Abney	rnance@riggsabney.com sgentry@riggsabney.com
Louis W. Bullock Robert M. Blakemore Bullock Bullock & Blakemore	lbullock@bullock-blakemore.com bblakemore@bullock-blakemore.com
Michael G. Rousseau Jonathan D. Orent Fidelma L. Fitzpatrick Motley Rice LLC	mrousseau@motleyrice.com jorent@motleyrice.com ffitzpatrick@motleyrice.com
Elizabeth C. Ward Frederick C. Baker William H. Narwold Elizabeth Claire Xidis Ingrid L. Moll Motley Rice **COUNSEL FOR PLAINTIFFS**	lward@motleyrice.com fbaker@motleyrice.com bnarwold@motleyrice.com cxidis@motleyrice.com imoll@motleyrice.com
Stephen L. Jantzen Patrick M. Ryan Paula M. Buchwald Ryan, Whaley & Coldiron, P.C.	sjantzen@ryanwhaley.com pryan@ryanwhaley.com pbuchwald@ryanwhaley.com
Mark D. Hopson Jay Thomas Jorgensen Timothy K. Webster Gordon D. Todd Erik J. Ives Sidley Austin LLP	mhopson@sidley.com jjorgensen@sidley.com twebster@sidley.com gtodd@sidley.com eives@sidley.com

Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
Timothy T. Jones tim.jones@tyson.com
Tyson Foods, Inc.

Michael R. Bond michael.bond@kutakrock.com
Erin Walker Thompson erin.thompson@kutakrock.com
Dustin R. Darst dustin.darst@kutakrock.com
Kutak Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Frank M. Evans, III fevans@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
William D. Perrine wperrine@pmrlaw.net
David C .Senger david@cgmlawok.com
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K.C. Dupps Tucker kctucker@bassettlawfirm.com
Earl Lee “Buddy” Chadick bchadick@bassettlawfirm.com
Vincent O. Chadick vchadick@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE’S INC. AND GEORGE’S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Conner & Winters, P.C.

Bruce W. Freeman — bfreeman@cwlaw.com
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker — jtuckercourts@rhodesokla.com
Colin H. Tucker — chtucker@rhodesokla.com
Theresa Noble Hill — thillcourts@rhodesokla.com
Kerry R. Lewis — klewis@rhodesokla.com
Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West — terry@thewesetlawfirm.com
The West Law Firm

Delmar R. Ehrich — dehrich@faegre.com
Bruce Jones — bjones@faegre.com
Krisann Kleibacker Lee — kklee@baegre.com
Todd P. Walker — twalker@faegre.com
Christopher H. Dolan — cdolan@faegre.com
Melissa C. Collins — mcollins@faegre.com
Colin C. Deihl — cdeihl@faegre.com
Randal E. Kahnke — rkahnke@faegre.com
Faegre & Benson LLP

Dara D. Mann — dmann@mckennalong.com
McKenna, Long & Aldridge LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves — mgraves@hallestill.com
D. Kenyon Williams, Jr. — kwilliams@hallestill.com
COUNSEL FOR POULTRY GROWERS

William B. Federman — wfederman@aol.com
Jennifer F. Sherrill — jfs@federmanlaw.com
Federman & Sherwood

Charles Moulton — charles.moulton@arkansag.gov
Jim DePriest — jim.depriest@arkansasag.gov
Office of the Attorney General
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Gary S. Chilton — gchilton@hcdattorneys.com
Holladay, Chilton & Degiusti, PLLC

Victor E. Schwartz — vschwartz@shb.com
Cary Silverman — csilverman@shb.com
Shook, Hardy & Bacon, LLP

Robin S. Conrad rconrad@uschamber.com
National Chamber Litigation Center, Inc.
COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND THE AMERICAN TORT REFORM ASSOCIATION

Richard C. Ford fordr@crowedunlevy.com
LeAnne Burnett burnettl@crowedunlevy.com
Crowe & Dunlevy
COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins richard.mullins@mcafeetaft.com
McAfee & Taft

James D. Bradbury jim@bradburycounsel.com
James D. Bradbury, PLLC
COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN

Mia Vahlberg mvahlberg@gablelaw.com
Gable Gotwals

James T. Banks jtbanks@hhlaw.com
Adam J. Siegel ajsiegel@hhlaw.com
Hogan & Hartson, LLP
COUNSEL FOR AMICI CURIAE NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG ASSOCIATION AND NATIONAL TURKEY FEDERATION

John D. Russell Jrussell@fellerssnider.com
Fellers, Snider, Blankenship, Bailey & Tippens, P.C.

William A. Waddell, Jr. waddell@fec.net
David E. Choate dchoate@fec.net
Friday, Eldredge & Clark, LLP
COUNSEL FOR AMICUS CURIAE ARKANSAS FARM BUREAU FEDERATION

Barry G. Reynolds reynolds@titushillis.com
Jessica E. Rainey jrainey@titushillis.com
Titus Hills Reynolds Love Dickman & McCalmon

William S. Cox, III wcox@lightfootlaw.com
Nikaa B. Jordan njordan@lightfootlaw.com
Lightfoot, Franklin & White, LLC
COUNSEL FOR AMICUS CURIAE AMERICAN FARM BUREAU FEDERATION AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

/s/ Philip D. Hixon